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The Supreme Court as an issue in presidential campaigns in the United States

Mark C. Miller

The federal judiciary in the American separation of powers system of government is a co-equal independent third branch, sometimes working in harmony with, but often in conflict with the separate federal legislative and executive branches.[1] Unlike many courts around the world, American judges clearly make important public policy decisions that in other societies would probably instead be made by legislative or bureaucratic institutions of government.[2] Therefore, the American courts are both legal and political institutions simultaneously. Since the founding of the nation, law and politics have been intertwined in the United States. As the French philosopher Alexis de Tocqueville observed in the early 1830s, in the U.S.A. almost every legal issue eventually becomes a political one, and almost every political issue eventually becomes a legal one.[3] Thus, the courts in the United States are some of the most powerful and the most activist in the world.[4]

In large part this judicial strength is due to the fact that all of the regular courts in the U.S. have the power of judicial review, defined by Americans as the ability of the courts to declare the actions of the states, the Congress, the federal bureaucracy, and the president to be unconstitutional and thus void. As Lawrence Baum, a leading scholar of judicial politics in the United States, notes: 'Courts and judges carry out a special function in American democracy, operating as a counterbalance to the other branches and thereby changing the political system.'[5] There are times when politicians in both the legislative and executive branches are very unhappy when the activist courts declare legislative statutes or executive branch decisions to be unconstitutional. Since the Supreme Court of the United States is at the top

[1] L. Fisher, *Constitutional dialogues: Interpretation as political process* (Princeton, NJ 1988).
[2] R. A. Kagan, *Adversarial legalism: The American way of law* (Cambridge, MA 2001).
[3] A. de Tocqueville, *Democracy in America*, translation by G. Lawrence and J. P. Mayer (New York 1969) 99-102.
[4] M. Shapiro, 'The United States' in: C. N. Tate and T. Vallinder ed., *The global expansion of judicial power* (New York 1995) 43-66: 44.
[5] L. Baum, 'The future of the judicial branch: Courts and democracy in the twenty-first century' in: K. L. Hall and K. T. McGuire ed., *The judicial branch* (New York 2005) 517-542: 517.

of the nation's judicial hierarchy, and its decisions are binding precedent for all lower court judges in both the state and federal court systems, it should come as no surprise that the rulings of the U.S. Supreme Court have often become campaign issues in U.S. presidential elections. This article will explore how during the twentieth and twenty-first centuries selected candidates for the presidency of the United States have attacked or supported the U.S. Supreme Court in their presidential campaigns. These campaign issues are obviously designed to gain the support of various groups and interests in American society who tend to support or oppose the decisions of the U.S. Supreme Court. Thus, law and politics are always intertwined in the U.S.A.

The U.S. Constitution is silent on the issue of judicial review. The Supreme Court took the power of judicial review for themselves (and all regular American courts) in the landmark case of *Marbury v. Madison* in 1803.[6] Aside from some esoteric debates among academics and some fairly extremist politicians,[7] almost everyone today agrees that American courts legitimately have the power of judicial review and thus the ability to determine the constitutionality of the actions of other political actors. There is, however, a very important philosophical and political debate about how judges should use this critical power. The two sides in this debate are often labeled judicial activists and judicial restraintists. Among judicial politics scholars, the definition of judicial activism generally has three parts: (1) activists see the U.S. Constitution as a living, changing document that the judges should interpret with a modern eye; (2) the courts should make public policy when the elected branches cannot or will not; and (3) activism means judges should not hesitate to declare something to be unconstitutional and thus void when their reading of the Constitution demands it. On the other hand, judicial restraint is defined as the opposite: (1) restraintists believe that judges should interpret the Constitution very narrowly, as the Framers intended in 1789 or when the various Amendments to the Constitution were added; (2) the courts should not make public policy, but should instead defer to the decisions of the elected branches; and (3) judges should very rarely if ever use their power of judicial review and thus rarely declare decisions of the elected branches to be unconstitutional.

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[6] *Marbury v. Madison* 5 U.S. 137 (1803).

[7] M. C. Miller, *The view of the courts from the Hill: Interactions between Congress and the federal judiciary* (Charlottesville, VA 2009).

Although the Supreme Court claimed the power of judicial review in 1803, declaring parts of the Judiciary Act of 1789 to be unconstitutional, the Court did not declare another federal act to be unconstitutional until 1857. In the early 1800s the Supreme Court instead directed its judicial activism at the states by declaring many state laws to be unconstitutional, thus strengthening and consolidating the power of the federal government. After the Civil War and during much of the Reconstruction period, the Court was mostly restraintist in its approach, fearing attacks from the Radical Republicans who controlled Congress at the time.

From the late 1800s until 1937, however, the U.S. Supreme Court was dominated by conservative judicial activists who read into the Constitution a right to contract which they felt prevented almost any governmental regulation of the economy, including minimum wage and maximum working hour laws. Starting in the early to mid 1950s and extending through the mid 1980s, the Supreme Court was dominated by liberal activists who believed that the role of judges was to protect the civil rights and liberties of political minorities like the non-religious, accused criminal defendants, racial and ethnic minorities, women who wanted abortions, flag burners, and other disenfranchised groups. Since the 1980s and including the contemporary period, however, the Supreme Court has issued both conservative activist and liberal activist decisions simultaneously, depending on the issue before it. A noted judicial politics scholar has referred to the Supreme Court under Chief Justice William H. Rehnquist (Chief Justice from 1986-2005) as 'The most activist Supreme Court in history' because none of the justices actually practiced judicial restraint, since all of them voted for a variety of activist decisions.[8] Note that I am using the terms 'conservative' and 'liberal' in their American sense, with conservative meaning right-wing in both social or economic terms, and liberal meaning left-wing or progressive on both social and economic issues. Throughout the twentieth century, some presidential candidates demanded that the Supreme Court be more restraintist while other candidates preferred that the Court be more activist.

[8] T. Keck, *The most activist Supreme Court in history: The road to modern judicial conservatism* (Chicago 2004).

Presidential elections in the early 1900s

As stated earlier, starting in the late 1800s the Supreme Court was dominated by conservative judicial activists who focused almost exclusively on economic issues. For example, the Court declared the federal income tax to be unconstitutional in *Pollock v. Farmers' Loan and Trust Co.* (1895),[9] and they significantly weakened Sherman Antitrust Act of 1890 in *United States v. E. C. Knight* (1895).[10] Although in this period the Supreme Court struck down a large number of federal and state laws that attempted to improve working conditions during the Industrial Revolution, this era became known as the Lochner Era when the justices declared unconstitutional a state law setting maximum hours of ten hours per day or sixty hours per week for bakers in *Lochner v. New York* (1905).[11] Presidential candidates in this period who represented business interests saw the Supreme Court as the protector of economic freedoms while those favoring government regulation of the economy attacked the Supreme Court for being improperly activist.

The presidential elections of 1896 and 1900 set the tone for the future elections in the early part of the twentieth century. In both elections, Republican William McKinley supported the Supreme Court's economic decisions and painted his opponent, Democrat William Jennings Bryan, as a radical because of his party's attacks on the Court. The Republicans were successful in convincing voters that the Democrats did not favor law and order, nor constitutional government. Statements by Populists and Democrats supporting Bryan gave ammunition to the Republicans. For example, in the summer of 1895, the former governor of Oregon, Sylvester Pennoyer, attacked the activism of the Supreme Court justices by proclaiming that 'Our government has been supplanted by a judicial oligarchy', and he called on Congress to impeach 'the nullifying judges.'[12] Governor Altgeld of Illinois argued that the Court 'has come to the rescue of the Standard Oil kings, the Wall Street people, as well as the rich

[9] *Pollock v. Farmers' Loan and Trust Co.* 198 U.S. 45 (1895).
[10] *United States v. E. C. Knight* 156 U.S. 1 (1895).
[11] *Lochner v. New York* 198 U.S. 45 (1905).
[12] S. Pennoyer, 'The income tax decision and the power of the Supreme Court to nullify acts of Congress', *American Law Review* 29 (1895) 550-558: 550.

mugwumps.'[13] Texas Governor J. S. Hogg labeled the Supreme Court as an instrument of Republican corporate power.[14] Candidate Bryan criticized the Supreme Court's economic decisions, but he also tried to distance himself from the most aggressive of these attacks on the Court. The Democratic platform in 1896 was perceived by many voters as anti-Court, and it did call for Congress to find a way to reverse the income tax decision.[15] The Republican William McKinley was easily elected in both the 1896 and 1900 presidential elections. President McKinley was assassinated in 1901, and Vice President Theodore (Teddy) Roosevelt then became president. Teddy was reelected in 1904, though he said little about the courts during these campaigns.

All American federal judges are appointed by the president and confirmed by the U.S. Senate for life terms (the selection methods and terms of office for state judges vary from state to state). In the presidential election of 1908, the Democrats again nominated William Jennings Bryan to run against the Republican nominee, William Howard Taft. Because four of the nine justices of the Supreme Court were over seventy years of age in 1908, judicial selection became an issue in this election. The country was in a pro-business conservative mood. Urged by New York Democrats to pledge to nominate pro-business conservatives to the Court, Bryan refused.[16] Taft easily won this election, and went on to appoint six of the nine justices to the Supreme Court during his single term in office.[17]

A major fight over judicial power occurred in the presidential election of 1912. Although Teddy Roosevelt had recommended that Taft to be the Republican presidential nominee in 1908, he tried hard to block Taft's nomination for reelection in 1912. Taft eventually won the 1912 Republican nomination, and he campaigned as a pro-court conservative during the fall election season. In fact, the Republican Party platform stated the importance of 'an untrammeled and independent judiciary' and it was the Republican intention to 'uphold at all times the authority and integrity of

[13] Quoted in H. Barnard, *Eagle forgotten: The life of John Peter Altgeld* (New York 1938) 336.
[14] D. G. Stephenson Jr., *Campaigns and the Court: The U.S. Supreme Court in presidential elections* (New York 1999) 126.
[15] W. G. Ross, *A muted fury: Populists, Progressives, and labor unions confront the court, 1890-1937* (Princeton, NJ 1994) 34-35.
[16] J. Daniels, *Editor in politics* (Chapel Hill, NC 1941) 548-50.
[17] Ross, *Muted fury,* 88-89.

the Courts, both State and Federal'.[18] Taft won the Republican nomination in part because many in the party felt that Teddy Roosevelt's views on the courts were too radical for the mainstream of the party. Taft repeated his support for the Supreme Court many times over the course of the fall election.[19] The eventual winner of the 1912 presidential election was Democrat Woodrow Wilson, who basically ignored the issue of the judiciary in his campaign. Wilson would go to win both the 1912 and 1916 elections.

Despite losing the Republican nomination in 1912, Teddy Roosevelt nevertheless ran for president that year, this time as the nominee of the Progressive Bull Moose Party. After leaving the presidency, Teddy Roosevelt came to believe that the courts in general and the U.S. Supreme Court in particular were the major impediment to progressive reforms in the country. Starting with his triumphant return to the U.S. in 1910 after spending time in Africa on safari, Teddy began an all out assault on judicial power and activism. In a speech to the Colorado legislature in August of 1910, Roosevelt

> accused the courts of blocking effective state and federal action to solve urgent national problems. Roosevelt charged that the courts had imposed artificial limits on the powers of the state legislatures and Congress to exercise control over the activities of large corporations.[20]

He then called for the voters to be able to overturn any court decision striking down a statute as unconstitutional. This so-called decision recall proposal would have resulted in greatly reduced power for the courts. As Roosevelt stated at the Progressive Party convention, 'people themselves must be the ultimate makers of their own Constitution.'[21] However, as the fall election came closer, Teddy spent less and less campaign time discussing the courts.

Teddy Roosevelt's attacks on judicial power were far less radical than the ideas promoted by the Socialist Party and its nominee for president in 1912, Eugene Debs. The Socialists called for the elimination of all federal courts below the U.S. Supreme Court, and they advocated for the abolition

[18] Stephenson, *Campaigns and the Court*, 128.
[19] Ross, *Muted fury,* 149.
[20] Ibidem*,* 131.
[21] Quoted in ibidem*,* 148.

of judicial review. Under the Socialist proposals, federal statutes could be repealed only by an act of Congress or by the voters in a national referendum.[22] The Socialists also wanted all judges to be elected by the voters for very short terms.[23]

In the presidential election of 1924, the courts would again appear as a major campaign issue. The Progressive Party nominated Senator Robert M. La Follette as their candidate for president to run against Republican Calvin Coolidge and Democrat John W. Davis. The Progressive Party in 1924 adopted the Socialist position of 1912 that judicial review was illegitimate. The party platform called for a constitutional amendment to outlaw judicial review and thus severely restrain the power of the courts. In fact, during the campaign La Follette often referred to the justices as 'petty tyrants and arrogant despots.'[24] The Progressives risked alienating ethnic voters and new immigrants with their anti-court rhetoric because the Supreme Court in 1923 had just declared unconstitutional laws that prevented school instruction in foreign languages.[25] Judicial politics scholars John Schmidhauser and Larry Berg have argued that taken as a whole, the Progressive attacks on the courts were 'all manifestations of lack of confidence in the integrity and impartiality of the judiciary.'[26]

In 1924 both the Republicans and the Democrats warned voters of the dangers of the Progressive plans for the courts. In fact, the Republicans attacked the Progressive proposals concerning the judiciary as revolutionary attacks on judicial independence.[27] Because the Supreme Court had declared any limits on child labor to be unconstitutional, the Republicans called for a constitutional amendment to overturn these specific decisions, but they did not take their attacks on the judiciary any further. The Democrats criticized the extensive use of judicial injunctions during labor disputes, but they also refrained from any significant attacks on the institutional independence of the courts. Later they joined the Republicans in portraying the Progressive

[22] Stephenson, *Campaigns and the Court*, 129.
[23] Ross, *Muted fury,* 151.
[24] Quoted in W. Murphy, *Congress and the court* (Chicago 1962) 50.
[25] Ross, *Muted fury,* 264.
[26] J. R. Schmidhauser and L. L. Berg, *The Supreme Court and Congress: Conflict and interaction, 1945-1968* (New York 1972) 36.
[27] Stephenson, *Campaigns and the Court*, 131.

plans as radical assaults on civil liberties. Eventually Coolidge won in a landslide, and anti-court proposals quickly faded away.

The Supreme Court and the New Deal

With the Great Depression's severe economic problems facing the nation, American voters in the 1932 presidential election overwhelmingly selected Democrat Franklin Delano Roosevelt (FDR) as their hope to improve the economy. Roosevelt brought large Democratic majorities in both houses of Congress into office with him. It was a landmark election in many ways. FDR immediately introduced a series of legislative proposals known as the New Deal. The New Deal abandoned laissez-faire economic approaches, and instead FDR advocated for an activist role for the federal government in protecting Americans from economic downturns. In contrast to most of his immediate Republican predecessors, FDR saw the federal government as the solution, not the problem. However, the New Deal ran headlong into a Supreme Court still dominated by conservative judicial activists who strongly mistrusted government interference with the economy. In a string of thirteen cases between 1933 and 1936, the Court declared many fundamental portions of the New Deal to be unconstitutional. At the same time, the Court declared unconstitutional over 30 state laws designed to improve economic conditions.[28] Many of these cases were decided by 5-4 votes, and FDR was furious with the justices who opposed his plan.

In the period of 1935-1937, Congressional Democrats introduced more court-curbing bills than in any other time in American history.[29] It thus appeared that the Supreme Court would become an important issue in the 1936 presidential election. The Republicans during the 1936 campaign painted FDR and the Democrats as dangerous radicals who had forsaken constitutional government.[30] Former Republican President Herbert Hoover said the New Deal dripped of the 'color of despotism… the color of

[28] H. Gillman, M. A. Graber, and K. E. Whittington, *American constitutionalism, volume 1: structures of government* (New York 2013) 418.
[29] M. Nelson, 'The president and the court: Reinterpreting the court-packing episode of 1937', *Political Science Quarterly* 103.2 (1988) 267-293: 273.
[30] Stephenson, *Campaigns and the Court*, 139.

Fascism… and the color of Socialism.'[31] The 1936 Democratic Party platform responded by announcing that:

> We have begun and shall continue the successful drive to rid of land of kidnappers and bandits. We shall continue to use the powers of government to end the activities of the malefactors of great wealth who defraud and exploit the people.[32]

Interestingly, both the Democratic Party platform and FDR himself carefully avoided almost any mention of the Supreme Court during the 1936 campaign. On the other hand, the 1936 Republican Party platform declared that that party was the protector of the Supreme Court and of the nation's constitutional democracy.[33]

Following his landslide victory in the 1936 elections, Roosevelt revealed his broadside attack on the Supreme Court. In his so-called court-packing plan, FDR proposed almost doubling the size of the Supreme Court. His public rhetoric stated that he wanted to assist the growing number of older justices sitting on the Court by decreasing their workload and appointing six new justices, one for each justice who had reached the age of 70. In reality, FDR wanted to appoint a majority of the justices so that the Supreme Court would then uphold the constitutionality of his New Deal. The Constitution does not set the number of justices who serve on the Supreme Court, and up until the late 1800s the Congress added to or subtracted from the number of justices on the Court to meet their short-term political needs. In 1937 Roosevelt's court-packing plan dominated public debate, and 'for five months, the mass media, the Congress, and the president focused on little else.'[34] During the debate on the court-packing plan, one justice reversed his position and started to vote to uphold the constitutionality of the New Deal. This change is often called 'The Switch in Time That Saved Nine.' Finally, starting in 1937, the long period of conservative judicial activism in the Supreme Court had come to an end.

While Congress rejected the court-packing plan, it did enact legislation that gave huge financial incentives to justices who retired early

[31] H. Hoover, *Addresses upon the American road* (New York 1938).
[32] Stephenson, *Campaigns and the Court*, 140.
[33] Miller, *View of the courts from the Hill*, 66.
[34] G. A. Caldeira, 'Public opinion and the U.S. Supreme Court: FDR's court-packing plan', *American political science review* 81 (1987) 1139-1153: 1140.

from the Supreme Court.[35] In part because of this generous early retirement plan, FDR was able to appoint eight justices to the Supreme Court over the next six years. Thus, Roosevelt's allies were able to dominate the Court for many years to come. Many argue that in the court-packing fight, Roosevelt lost the battle but won the war. Kevin McMahon disagrees with many scholars who think that FDR's court-packing plan was poorly conceived. McMahon argues that:

> In profound ways, FDR's constitutional vision inspired the design of his proposal to reform the judiciary. Compared to the many alternatives floating about Washington at the time, Roosevelt chose one of the few that enhanced the power of the presidency.[36]

While the fight between FDR and the Supreme Court is dramatic, it should be viewed in a historical framework. The 1936 election was quite important for the Court. As Stephenson reminds us: 'For the first time since the Jacksonian era, the Court squarely opposed the defining policies of the administration in power. For the first time since 1860, the Court found itself on the losing side of a presidential election.'[37] Remember that liberal unhappiness with the Supreme Court had been building for decades prior to the first election of FDR to the presidency in 1932. As Ross concludes, 'The conflict between Franklin D. Roosevelt and the Supreme Court that reached its denouement in 1937 was merely the culmination of a struggle that had raged with varying degrees of intensity for a half century.'[38]

Conservatives begin to attack the Supreme Court

During the 1940s and early 1950s, the Supreme Court remained mostly restraintist in its approach to legislation and executive actions supported by Presidents Franklin Roosevelt and Harry Truman. Then starting in the mid 1950s the Supreme Court switched to liberal judicial activism. The Court

[35] D. M. O'Brien, *Storm center: The Supreme Court in American politics* (7th edition, New York 2005) 348.
[36] K. J. McMahon, *Reconsidering Roosevelt on race: How the presidency paved the way to Brown* (Chicago 2004) 66.
[37] Stephenson, *Campaigns and the Court*, 136.
[38] Ross, *Muted fury*, 1.

seemed uninterested in economics cases, and instead focused almost exclusively on civil rights and civil liberties issues. Earl Warren, the former moderate Republican governor of California, was appointed Chief Justice by President Eisenhower in October of 1953. The Warren Court became the epitome of liberal judicial activism, because the justices believed that the Court should protect the rights of unpopular political minorities. This would last almost 15 years, as Chief Justice Warren announced his retirement during the presidential election cycle of 1968, which will be discussed in more detail below.

During the Civil Rights Era of the 1960s, President Lyndon B. Johnson (LBJ) was able to get Congress to enact his Great Society program, also known as the War on Poverty. Congress during this time also enacted the Civil Rights Act of 1964 and other landmark civil rights legislation. LBJ's Great Society initiatives were even more ambitious and broader in scope than FDR's New Deal. The Great Society era thus greatly increased government sponsored social programs for the poor and disenfranchised, and greatly increased the role of an activist federal government in American society. As several scholars describe the views of the New Deal/Great Society period:

> The national government was responsible for guaranteeing to all American citizens a broad array of both positive and negative freedoms. Proponents of the New Deal and Great Society argued that negative rights (protections from government) such as free speech and equal protection had not yet been given sufficient breadth. They added economic security to the positive rights (duties on government) that they believed warranted constitutional protection.[39]

Conservatives reacted with alarm. American conservatives had seen the Supreme Court as the great protector of economic freedoms from the late 1800s until 1937. Starting in the 1950s, however, conservatives began to fear unfettered judicial power that was advancing the liberal agenda. Barry Goldwater, the 1964 Republican presidential candidate who ran against Democratic President Lyndon B. Johnson, started talking about failure of the national government to fight 'crime in the streets' and to ensure 'law and order'. Goldwater did not attack the Supreme Court directly, although it

[39] Gillman et al., *American constitutionalism*, 117-18.

was clear from his rhetoric that he thought the Supreme Court was taking the country down the wrong path. But in 1968, Republican Richard Nixon would make the courts a centerpiece of his presidential campaign.

The 1968 presidential election occurred in one of the most turbulent times in American history. The Vietnam War was a very important campaign issue, but other issues also concerned Americans in this period of turmoil. Richard Scammon and Ben Wattenberg called this the 'social issue.'[40] This 'social issue' included fears and misgivings due in part to

> ghetto riots, campus riots, street crime, anti-Vietnam marches, poor people's marches, drugs, pornography, welfarism, and rising taxes, [which] all had a common thread: the breakdown of family and social discipline, of order, of concepts, of duty, of respect for law, of public and private morality.[41]

Richard Nixon blamed all of these social problems on the liberal activism and permissiveness of the federal courts in general and on the U.S. Supreme Court in particular. The third party candidate that year, George Wallace, agreed. Thus, conservatives would do everything they could to end the liberal activism of the Warren Court era. In their eyes

> the Court's recent rulings had aided Communist forces, abetted criminals intent on causing harm, threatened to dislodge schoolchildren from the security of their neighborhoods, unleashed a wave of pornographic smut, released murderers from death row, forced prayer out of the schools, and loosened society's constraints on sexual promiscuity.[42]

The Democrats were in disarray in 1968. President Lyndon B. Johnson, the father of the Great Society and the War on Poverty, was also held responsible for the deep conflicts in American society caused by the Vietnam War. LBJ eventually decided not to run for reelection, and after a bruising party convention in Chicago that was marred by riots outside the convention hall, the Democratic Party nominated LBJ's Vice President,

[40] R. Scammon and B. J. Wattenberg, *The real majority: An extraordinary examination of the American electorate* (New York 1970) 39.
[41] K. J. McMahon, *Nixon's Court: His challenge to judicial liberalism and its political consequences* (Chicago 2011) 3.
[42] McMahon, *Nixon's Court*, 3.

Hubert Humphrey, to be their nominee for president. The Democratic convention was complicated even more by the fact that Chief Justice Earl Warren announced just before the convention convened that he would step down from the Supreme Court, giving the new president the chance to fill the Chief Justice's seat on the Court. Humphrey expressed his strong support for the Supreme Court's rulings, and for its Chief Justice. Many judicial politics scholars have noted that Warren Court rulings furthered the political agenda of the Democrats in the 1960s. Lucas Powe Jr. has noted that the Warren Court represented, 'the purest strain of Kennedy-Johnson liberalism. The Warren Court seemed to combine Kennedy's rhetoric with Johnson's ability to do the deal.'[43] Howard Gillman agrees, arguing that, 'constitutional decision making during this period cannot be understood without situating the Court in the larger context of 1960s Democratic party politics.'[44] However, the Democratic Party's support for the Supreme Court hurt them with many voters. As Stephenson notes, 'Because the Supreme Court had recently rendered decisions touching many of the public's anxieties, it was dragged into the mayhem.'[45]

In 1968, however, the Democrats lost the once solidly Democratic South because their pro civil rights agenda was skillfully exploited by Nixon and Wallace, and they lost many Northern ethnic voters because they were

> turned off by the recent events in the streets of America and a perception that [the Democratic Party] cared too much about advancing civil rights and not enough about their own concerns.[46]

Southerner George Wallace, the candidate of the American Independent Party, attacked the Supreme Court whenever possible on the campaign trail. One of his favorite lines was something like this:

> If you walk out of this hotel tonight and someone knocks you on the head, *he'll* be out of jail before *you're* out of the hospital, and on Monday morning they'll try the *policeman* instead of the criminal.[47]

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[43] L. Powe Jr., *The Warren Court and American politics* (Cambridge, MA 2000) 494.
[44] H. Gillman, 'Party politics and constitutional change: The political origins of liberal judicial activism', in: R. Kahn and K. I. Kersch ed., *The Supreme Court and American political development* (Lawrence, KS 2006) 138-168: 154.
[45] Stephenson, *Campaigns and the Court*, 169.
[46] McMahon, *Nixon's Court*, 38.
[47] Quoted in McMahon, *Nixon's Court*, 42.

Thus, for both Richard Nixon and George Wallace in 1968,

> the Supreme Court became a powerful tool for attracting votes, a device for constructing a new electoral coalition. In Nixon and Wallace's framing, the Earl Warren-led Court, in its drive to out inequality and racial discrimination from the core of the American experience, had done more wrong than right.[48]

Richard Nixon's strategy of attacking the Supreme Court paid off, and he was elected president in 1968. One of Richard M. Nixon's finest moments was the appointment in early 1969 of Warren Burger to be Chief Justice of the United States. Nixon firmly hoped that the Warren Court period of liberal judicial activism would come to an end.

Although the Supreme Court was far less liberal in the 1970s and 1980s than it had been under Warren, the Burger Court did not fully retreat from many of the Warren Court decisions. Conservatives were disappointed that the Burger Court did not overturn many activist Warren Court decisions which they despised. Instead of bringing radical change to the law, the Burger Court for the most part maintained the status quo, and one influential book at the time was entitled *The Burger Court: The counter-revolution that wasn't.*[49] Therefore, conservatives remained very wary of the Supreme Court, even when it handed down fairly conservative decisions. Thus, in the elections of 1980, Republican Ronald Reagan again used attacks on the Supreme Court to fire up his conservative base. Reagan needed to attract voters from the growing Religious Right movement. These social conservatives were angry that the Supreme Court had ruled in favor of abortion rights, and the Republican Party platform called for the 'appointment of judges who respect traditional family values and the sanctity of innocent human life.' To counter concerns that he would use an ideological litmus test for his appointments to the Supreme Court, Reagan pledged to nominate the first woman to the high court. But Reagan made his attacks on the Supreme Court the centerpiece of his appeals to the Religious Right and other conservative voters.[50]

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[48] McMahon, *Nixon's Court*, 3.

[49] V. Blasi ed., *The Burger Court: The counter-revolution that wasn't* (New Haven, CT 1986).

[50] Stephenson, *Campaigns and the Court*, 201-204.

Democrat Jimmy Carter was running for reelection in 1980, despite the fact that the economy was poor and the Iranians were holding Americans as hostages in Tehran. Facing an uphill battle, Carter came out in favor of abortion rights and other liberal civil liberties issues. In general, he did not attack the Supreme Court but he was hesitant to praise it too much. Carter tried to paint Reagan as an extremist, whose judicial appointments would be especially dangerous to the nation. Carter received support from the American Bar Association and many law school professors.[51] Ronald Reagan won the election, and then went on to appoint as many conservative activist judges as possible to the Supreme Court and to the lower federal courts.

Conclusion

Thus, throughout the Twentieth Century, the Supreme Court was a major issue in many presidential campaigns, while in the era of conservative judicial activism, liberals and progressives attacked the Court. In the era of liberal judicial activism, conservatives attacked the Court. This returns us to the notion that in the U.S., all legal issues eventually become political ones and all political ones eventually become legal ones. In fact, the contested presidential election of 2000 produced one of the most important Supreme Court decisions in history, as the Supreme Court decided that election in its highly controversial *Bush v. Gore* decision.[52]

In the 2012 campaign for president, the Supreme Court is yet again an issue. Many of the more conservative Republican candidates for president attacked the federal courts in general and specifically the Supreme Court during the Republican primary season. For example, Governor Rick Perry of Texas called for term limits for Supreme Court justices, who currently have life appointments to the bench. Representatives Michele Bachmann and Ron Paul said they would forbid the Supreme Court from ruling on cases regarding same-sex marriage. As Senator Rick Santorum stated, 'If you want to send a signal to judges that we are tired of them

[51] Stephenson, *Campaigns and the Court*, 201-204.
[52] *Bush v. Gore* 531 U.S. 98 (2000). See H. Gillman, *The votes that counted: How the Court decided the 2000 presidential election* (Chicago 2001).

feeling that these elites in society can dictate to us, then you have to fight back.'[53]

President Obama will also use the Supreme Court as an issue in the 2012 presidential elections. Fearful that the Supreme Court would declare his signature health care reform initiative to be unconstitutional, and signaling his willingness to attack the Supreme Court in the upcoming campaign, President Obama declared that such a judicial action, 'would be an unprecedented, extraordinary step' of conservative judicial activism.[54] The Supreme Court apparently received the message, and upheld most of President Obama's Affordable Care Act by a very narrow 5-4 vote in late June of 2012. In *National Federation of Independent Business v. Sebelius* (2012), the Court upheld the constitutional power of Congress to require individuals to purchase health insurance. This was the key issue for the President's health care reform program. Although the Court ruled that the Congress could not require individuals to purchase health insurance under its power to regulate interstate commerce, Congress did have the authority under its taxing powers to penalize anyone who did not purchase health insurance. Thus, the Supreme Court upheld the so-called individual insurance mandate as a tax or penalty. On the other hand, the Court did rule that Congress had exceeded its constitutional powers when it required the states to expand the Medicaid program, which is health care for the poor. Congress could give financial incentives to the states to expand coverage under the Medicaid program, but it could not require the states to participate in the new broader version of the program.

Thus, both parties may now be using attacks on the Supreme Court in order to stir up potential voters. As one journalist noted:

> For decades, Republicans have railed every four years against the Supreme Court and its perceived liberal activism to spur conservatives to elect presidents who will appoint like-minded justices. Now strategists in both parties are suggesting this could be the Democrats' year to make the court a foil to mobilize voters.[55]

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[53] Quoted in A. Liptak and M. D. Shear, 'Republicans turn judicial power into a campaign issue', *The New York Times,* October 23, 2011.

[54] J. Markon, 'Justice Department told to clarify position on judicial power', *Washington Post*, April 4, 2012, A6.

[55] J. Calmes, 'In a reversal, rulings could goad Democratic voters', *The New York Times*, April 5, 2012, A14.

Certainly, in the future the Supreme Court will remain an important campaign issue for candidates running for President of the United States.